FILE COPY.

FILED
FEB 26 19
JAMES H. MCKENNEY

Supreme Court of the United States

OCTOBER TERM, 1903.

No. 177

JULES S. BACHE

Appellant

against

SAMUEL HUNT, AS RECEIVER OF THE TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD COMPANY AND TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY

Appellees

BRIEF FOR APPELLANT.

F. SPIEGELBERG
Of Counsel for Appellant

B. H. TYRREL, PRINTER, 122-133 FULTON ST., NEW YORK.

16588

Supreme Court of the United States,

OCTOBER TERM 1903.

No. 177.

JULES S. BACHE,
Appellant.

vs.

SAMUEL HUNT, as Receiver of the Toledo, St. Louis & Kansas City Railroad Company, and TOLEDO, ST. LOUIS & WESTERN RAILROAD COMPANY.

Brief for Appellant.

This is an appeal from a final decree of the United States Circuit Court for the Northern District of Ohio, entered December 4th, 1902, on the petition of the appellee receiver after the appellant's plea to the jurisdiction of the court of his person and of the subject matter of the petition had been overruled, and after the entry of an order, on appellant's failure to answer, taking the petition *pro confesso* against him. The appeal is prosecuted directly to this court upon the certificate of the Circuit Court, contained in the order allowing appeal, that the jurisdiction of said court is in issue.

Statement of Facts.

The line of railroad now belonging to the Toledo, St. Louis & Western Railroad Company, extending from Toledo, Ohio, to East St. Louis, Illinois,

was, prior to 1886, operated as a narrow-gauge railroad by the Toledo, Cincinnati & St. Louis Railroad Company. The road was made up of two divisions: one, the Toledo division, extending from Toledo to Kokomo, Indiana, and the other the St. Louis division, extending from Kokomo to East St. Louis. The Toledo division was subject to a mortgage made by the Toledo, Delphos and Burlington Railway Company; the St. Louis division to one made by the Toledo, Cincinnati & St. Louis Railroad Company.

Default having been made in the payment of interest on the bonds, actions were instituted for the foreclosure of the two divisional mortgages. (Record, page 2.) Pending these proceedings an agreement of re-organization was made under date of April 9, 1884, between certain mortgage bondholders and creditors of the Toledo, Delphos & Burlington Railway Company and of the Toledo, Cincinnati & St. Louis Railroad Company on the one hand, and James M. Quigley and others on the other hand, pursuant to which the re-organization committees of the St. Louis division bondholders and of the Toledo division bondholders were constituted, of both of which James M. Quigley was made chairman (Record, page 5, and Exhibit A attached to petition, page 14).

On December 18, 1885, James M. Quigley as chairman of said committees entered into a memorandum of agreement with Sylvester H. Kneeland for the purchase by said Kneeland of the two divisions of railroads at the foreclosure sales thereof. (Record, page 5, and Exhibit B of petition, page 25.)

Pursuant thereof on December 30, 1885, the Toledo division was sold to Kneeland under decrees entered in the Circuit Court of the United States for the District of Indiana, the court of primary jurisdiction, and in the Circuit Court of the United States for the Northern District of Ohio, and on the same day the St. Louis Division was also sold to Kneeland under decrees entered in the Circuit

Court of the United States for the District of Indiana, the court of primary jurisdiction and in the Circuit Court of the United States for the Southern District of Illinois (Record, pages 2 and 3). Each decree found, in addition to the usual provisions, that within a prescribed time after the confirmation of the sale thereunder the purchaser should pay of the unpaid purchase money a sum sufficient, taken with the cash payment to be made at the time of the sale, to pay all costs, fees, claims, debts and taxes adjudged to be due as court and receiver's indebtedness, excepting such final decrees upon said claims and debts as might have been superseded by proper appeal and supersedeas bonds, and, upon such payment, the purchaser should be let into the possession of his purchase; and upon confirmation of the sale and the payment of that part of the purchase money, which by the terms of the decree, was payable by the purchaser, the master should deliver to the purchaser a deed of conveyance of the mortgaged railroad and property; that said deed should contain an express stipulation reserving to the court jurisdiction over the mortgaged property, with full power to re-take possession thereof upon default of the purchaser in complying with the requirements of the decree respecting the payment of the purchase money. Each decree further provided that the residue of the purchase money not required to make the payments above stated should be paid by the purchaser from time to time upon the amounts adjudged by the court to be due and payable upon court and receiver's indebtedness and to be prior and superior to the lien of the mortgage foreclosed, until the entire purchase money should be exhausted, and that any surplus after the payment of such indebtedness should be distributed *pro rata* upon the coupons and bonds of the mortgage. It was further provided that the purchaser, at the aforesaid sale, reserved the right to appeal from any order or final decree made by the court decree-

ing the payment of claims adjudged to be due as court and receiver's indebtedness and to be prior in equity to the mortgage in suit (Record, pages 3 and 4).

The sales were confirmed on February 5, 1886, and on March 10th, 1886, the form of the master's proposed deed was approved and its delivery directed, the court again reserving to itself power to retake possession of the property if the grantee failed to comply with the decrees of sales in respect to payment of the purchase money. In pursuance of said order the master's deed of the property was delivered to the purchaser, Kneeland, which deed contained a provision relating to the authority of the court to retake possession of the property in accordance with the terms of the decree (Record, page 4).

Previous to the delivery of the master's deed, and on January 23, 1886, Kneeland had entered into two agreements, one with the re-organization committee of the St. Louis Division bondholders and the other with the committee of re-organization of the Toledo Division bonhholders, of both of which committees Quigley was chairman. These two agreements are identical in substance and provide for the equipment, reconstruction and broadening into standard gauge lines of the two divisions of the railroad purchased by Kneeland on December 30, 1885 (Record, page 5). The main points of these agreements (Exhibits C and D to petition, pages 26 and 33) are as follows:

First.—Kneeland agreed to complete his purchase of the two divisions in accordance with the terms of the decrees.

Second.—Kneeland agreed to organize railroad corporations under the laws of the States of Ohio, Indiana and Illinois, capitalized at $25,000 per mile of road, and that he would convey to them severally those parts of the railway within the states of their organization.

Third.—That such corporations should be consolidated, and that the consolidated company should issue

(*a.*) Six per cent, thirty-year gold bonds to the amount of $20,000 per mile secured by a first mortgage.

(*b.*) Common stock to the amount of $25,000 per mile.

(*c.*) $5,805,000 four per cent. non-voting noncumulative preferred stock.

Fourth.—Kneeland agreed to change the gauge of the railroad to the standard gauge, to equip the road with the necessary rolling stock, to make certain other improvements.

Fifth.—That the bonds and the common stock should be deposited with two trustees, one to be selected by Kneeland and the other by the other parties to the agreements, and should be delivered by said trustees to Kneeland from time to time as the work of reconstruction and equipment progressed.

Sixth.—That $1,000,000 of the preferred stock should likewise be deposited with said two trustees to be delivered to Kneeland in compromising, adjusting and settling claims and suits then existing and pending or suits that may thereafter be brought against said lines or the consolidated company.

Seventh.—$4,805,000 of the preferred stock should be exchanged upon certain terms for the indebtedness secured by the foreclosed divisional mortgages of the two narrow-gauge roads.

Eighth.—That Kneeland should pay interest accruing on the bonds while the work of reconstructing and equipping the road was going on, but that

the net earnings of the road during that period should be applied to betterments and improvements.

In pursuance of these agreements Kneeland caused to be organized three railroad corporations under the laws of Ohio, Indiana and Illinois, respectively, with an aggregate capitalization of $12,250,000 being $25,000 per mile of road, and on the organization of said companies Kneeland entered into a contract with each of them in substantially the same terms. Each of these agreements made provision for a consolidation with the two other corporations and for the re-construction of the road by the consolidated company and for the issue of the securities by the said consolidated company as contemplated by the agreements of January 23, 1886. Each of the railroad companies delivered to Kneeland its entire capital stock and received from Kneeland that part of the railway situated within its respective state. Upon the organization of the companies these reciprocal conveyances of the stock and the line of railroad were made by each railroad company and Kneeland respectively, as contemplated in said agreements (Record, pages 5 and 6).

On June 12, 1886, these three companies entered into an agreement of consolidation forming the Toledo, St. Louis & Kansas City Railroad Company. The consolidated company by proper proceedings authorized the issue of common stock to the par amount of $12,250,000, the aggregate of the capital stock of the consolidated companies, $5,805,000 preferred stock and $9,800,000 thirty-year six per cent. first mortgage bonds, and on June 19, 1886, executed and delivered a first mortgage on its line of railroad, equipment and property to the thereinnamed trustees for the purpose of securing the payment of said bonds. Of the bonds only nine thousand were ever issued, and of the common stock $11,250,000, and all of these bonds and stock were pursuant to agreements of January 23, 1886, and

for the purposes therein specified, delivered to Isaac W. White and Robert G. Ingersoll, the trustees appointed under said two agreements. As the work of re-construction and equipment undertaken by Kneeland progressed deliveries were made by these two trustees to Kneeland from time to time (Record, pages 6 and 7.)

Sundry disputes and controversies having arisen between Kneeland and the Toledo, St. Louis & Kansas City Railroad Company, an agreement of settlement was made bearing date June 1st, 1891, to which agreement the re-organization committees of the St. Louis Division bondholders and of the Toledo Division bondholders assented. This agreement contained a clause that in case of the failure of Kneeland to perform any of the provisions of the agreement the same shall become void *ab initio* as a settlement and that all matters in dispute should then be reopened and resettled. This provision was eliminated by a supplementary agreement between the parties made June 3, 1891, to which agreement the two reorganization committees also assented in writing and the following clause was substituted, to wit: "and said agreement of June "1st, 1891, shall be and the same hereby is amended "so that it shall be absolute in its terms, and that "the only remedy of either party, for any breach "thereof, shall be by action founded upon the con- "tract, whether for damages or for specific per- "formances or otherwise, as the case may require." (Record, page 60).

At the time of the execution of these agreements of June 1st, 1891, Kneeland had not completed payment of the purchase price of the railroad purchased by him at the foreclosure sales of the Toledo and St. Louis Divisions and there were then outstanding unpaid claims amounting to $350,000 and upwards, which under the terms of the foreclosure decrees had been contested by Kneeland, and which, if established, entitled said claims to be paid out of the proceeds of said

divisions, in priority to any distribution of the proceeds of sale to the holders of the bonds secured by the mortgages foreclosed. By said agreements of June 1st, 1891, it was agreed, among other things, that the trustees under the agreement of January 23rd, 1886, after the distribution of certain securities in their hands, should deliver all the remainder of such securities to the Farmers' Loan & Trust Company of the City of New York upon the execution by said trust company of a declaration of trust to the effect that it agreed to receive and hold such securities in accordance with said trust, and that said trust company should thereupon hold the same in trust as security for the payment of all the purchase money under said foreclosure sale due from Kneeland to the extent of all claims upon the proceeds of said sale which were prior to the claims of said old first mortgage bonds of the two narrow-gauge divisional lines, and upon the further agreement to pay over and deliver to Kneeland said securities as fast as he should pay said claims against said proceeds of the foreclosure sale (Record, pages 8, 83 and 84, and Exhibit F to petition, page 46). The Farmers' Loan & Trust Company thereupon executed a declaration of trust which was assented to by Kneeland and the railroad company (Record, page 53).

Pursuant to said agreement of settlement of June 1st, 1891, the Farmers' Loan & Trust Company as trustee received in June, 1891, and June, 1893, the following securities which it has held as such until the 28th day of May, 1900, to wit:

158 first mortgage bonds of the par value of $1,000 each of the Toledo, St. Louis & Kansas City Railroad Company;

11,690 shares of the common capital stock of the par value of $100 each of said railroad;

5,000 shares of the preferred capital stock of the par value of $100 each of said railroad company (Record, page 9).

On May 18, 1893, by orders of the Circuit Courts

for the Northern District of Ohio, for the District of Indiana, and for the Southern District of Illinois, a receiver of the Toledo, St. Louis & Kansas City Railroad Company and of all its property, was appointed on bills filed in said courts by Joseph S. Stout and Randolph F. Purdy against said railroad company (Record, page 9). On June 1st, 1893, the Toledo, St. Louis & Kansas City Railroad Company defaulted in the payment of the interest on its first mortgage bonds due on said day, and thereafter on December 16th, 1893, the Continental Trust Company and John M. Butler, the substituted trustees under the first mortgage, filed bills for the foreclosure of said mortgage in the above courts, and the same receiver was appointed under these foreclosure bills and the two actions were consolidated (Record, page 10). On December 1st, 1898, the petitioner, Samuel Hunt, was appointed receiver of said railroad company.

Notwithstanding the agreement of June 1st, 1891, Kneeland failed to make payment of the unpaid residue of the purchase price of the narrow gauge railroad purchased by him at the foreclosure sale thereof, although claims were finally established in said foreclosure actions to the amount and upwards of $300,000, which were adjudged prior in lien to the mortgages foreclosed by the respective decrees under which said sales were made (Record, page 10).

On February 7th, 1898, by an order of this court entered upon the petition of the then receiver of the Toledo, St. Louis & Kansas City Railroad Company it was found that there was due in respect to the said prior claims to various holders amounts aggregating, with interest, upwards of $500,000, who were entitled to payment out of the property embraced in said first mortgage of said Toledo, St. Louis & Kansas City Railroad Company in priority to the mortgage bondholders, and the receiver was directed to take up said claims, and for that purpose to apply out of the moneys

arising from the operation of the railroad and property embraced in said first mortgage the sum of $125,000. It was further provided that for the residue of the amount necessary to take up said claims with interest, receiver's certificates should issue to the amount of $430,000, and such certificates were made a first lien upon all the property of the Toledo, St. Louis & Kansas City Railroad Company of every nature and description then in the possession of the court and paramount and superior to any lien thereon of the first mortgage of the said railroad company and to all rights and claims therein of any party to the then pending foreclosure action, and that the same should be paid out of the proceeds of the sale of the mortgaged premises, unless sooner paid, and might also be paid out of any funds arising from the operation of said mortgaged railroad and property available for that purpose (Record, page 11).

The receiver, in accordance with said order, paid the sum of $125,000 and issued receiver's certificates to the amount of $430,000, of which $400,000, together with interest on the entire issue from time to time outstanding, were paid in accordance with the order of February 7th, 1898, by the receiver for the time being of said railroad out of the moneys in his hands. The outstanding receiver's certificates, if any, were required and directed to be paid by the decree of foreclosure hereinafter mentioned out of the proceeds of sale of the property embraced in said first mortgage of the Toledo, St. Louis and Kansas City Railroad, unless sooner paid out of the funds arising from the operation of the mortgaged property (Record, pages 11 and 12). At the time when the appellant instituted the action in the New York Supreme Court, hereinafter referred to, all said liens and claims had been paid and discharged (Record, page 86).

On April 1st, 1898, a decree was entered in the United States Circuit Court for the Northern District of Ohio foreclosing said first mortgage of said

railroad and directing a sale of the mortgaged premises. Decrees of similar effect were thereupon entered in the Circuit Courts for the District of Indiana and for the Southern District of Illinois (Record, pages 12 and 86). The decree of foreclosure adjudged, among other things, the first mortgage to be a lien upon all moneys, profits and income derived by the receiver from the operation of the said mortgaged railroad and property (Record, page 13); and further adjudged that the principal of all said bonds issued by the Toledo, St. Louis and Kansas City Railroad Company was due and payable, and that there was due and owing in respect of said first mortgage bonds at the date of the entry of the decree and the principal thereof, to wit: $9,000,000 and the interest thereon, amounting in all to $12,028,500 (Record, page 86). The 158 first mortgage bonds which the Farmers' Loan and Trust Company then held in pursuance of the declaration of trust, under the agreement of June 1st, 1891, are a portion of the 9,000 bonds, the principal and interest of which were found by said decree of April 1st, 1898, to be due (Record, page 86). An appeal having been taken from the decree of April 1st, 1898, to the United States Circuit Court of Appeals for the Sixth Circuit, and the same having been affirmed by the decree of November 13, 1899, and said last-mentioned decree having been re-entered on January 19th, 1900, the mortgaged premises were on March 27th, 1900, sold to Morton S. Paton and Richard B. Hartshorne for the sum of $12,200,000. Said sale was, by orders entered in April, 1900, confirmed and made absolute. At the time of the sale there was due in respect of said first mortgage bonds and coupons of the railroad company approximately the sum of $13,500,000 (Record, pages 12, 13 and 87).

In the meantime, and ever since June, 1891, the bonds and stock which had been delivered to the Farmers' Loan and Trust Company, pursuant to

the agreement of June 1st, 1891, had remained uninterruptedly in the possession of said trust company, situated within the State of New York and the United States Courts in which the general creditor suit and the foreclosure suit were pending, had never, by any order, decree or process, exercised or sought to exercise any control over them, or appointed a receiver of them, nor had any of the receivers of the railroad company demanded possession of them or any of them, or exercised or sought to exercise any control over them or made any claim or demand for them (Paragraph 4 of Plea, Record, page 77).

On May 17, 1900, the appellant, Jules S. Bache, commenced an action in the Supreme Court of the State of New York against Sylvester H. Kneeland, the Toledo, St. Louis & Kansas City Railroad Company, and the Farmers' Loan & Trust Company by the personal service of a summons and complaint upon all the defendants for the purpose of subjecting the said bonds and stock in the hands of the Farmers' Loan & Trust Company to the lien of two judgments which said Bache recovered against Kneeland and the Toledo, St. Louis & Kansas City Railroad Company in the Supreme Court of the State of New York, on May 19, 1893, for $72,005.65, and the other on July 23, 1894, for $43,278.64 (Record, page 76, and Exhibit B to the Plea, page 82). On May 23, 1900, the plaintiff in said action then pending in the Supreme Court of the State of New York, served on the defendants notice of motion for an order appointing a receiver of all the property which had come into the possession of the Farmers' Loan & Trust Company pursuant to the agreement of June 1st, 1891, to take and hold the same pending said action, subject to the further orders of the Supreme Court of the State of New York. And upon the return day of said motion, to wit, the 28th day of May, 1900, an order was duly made by said Supreme Court granting said motion and appointing the Farmers' Loan

& Trust Company such receiver. The Farmers' Loan & Trust Company filed with the Clerk of the County of New York its consent to act as such receiver, and on the same day, to wit, the 28th day of May, 1900, turned over to itself, as such receiver, the 158 first mortgage bonds and the stock hereinbefore referred to (Record, page 77, and Exhibit C, page 89).

On or about the last mentioned day, but subsequent to the turning over of the bonds to the Farmers' Loan & Trust Company by the receiver pursuant to the order of the Supreme Court of New York (§ 5 of Plea, Record page 78), Samuel Hunt, as receiver of the Toledo, St. Louis & Kansas City Railroad Company, filed his petition in the United States Circuit Court for the Southern District of Ohio, praying a decree of that court that the petitioner is entitled out of said first mortgage bonds and said preferred stock and said common stock in the hands of the Farmers' Loan & Trust Company, to be reimbursed such amounts with interest thereon from the respective dates of payment thereof which by the petitioner and by his predecessors in the receivership of said Toledo, St. Louis & Kansas City Railroad Company have been paid in respect of said prior claims whether of principal or interest; that said securities towards the satisfaction thereof he delivered as a part of the mortgaged premises to the purchasers of the mortgaged premises at the said sale thereof made under said decrees of foreclosure of the first mortgage of the Toledo, St. Louis & Kansas City Railroad Company, or that such securities be sold and the proceeds thereof paid to the petitioner for payment by him to the purchasers of the mortgaged premises or to be paid to said purchasers, and for such other and further relief as may be just (Record, page 13).

The petition of the receiver is entitled in the cause of the "Continental Trust Company of the City of New Yord against the Toledo, St. Louis &

Kansas City Railroad Company and others," being the title of the causes consolidated by the order of December, 1893, hereinabove referred to, in which the foreclosure proceedings were had and the final decree of foreclosure was entered. The petition does not show any connection of the appellant Bache with any of the proceedings had in said consolidated action, in fact, it does not mention his name directly or indirectly. Nor does the petition refer to any of the proceedings had in the Supreme Court of the State of New York.

On May 29, 1900, an order was made on said petition by United States District Judge Thompson, sitting by designation at his chambers in the City of Cleveland, Ohio, ordering the Continental Trust Company, the Toledo, St. Louis & Kansas City Railroad Company, Jules S. Bache, Sylvester H. Kneeland and the purchasers of the mortgaged premises to answer, demur or plead to the petition, and although the order does not give any direction that the same should be served on or mailed to Jules S. Bache, a copy thereof was on May 31, 1900, mailed to Bache and received by him the following day (Record, pages 64, 79 and 91). On June 9, 1900, a similar order was made by District Judge Ricks at Toledo, Ohio, in respect to the Farmers' Loan & Trust Company, and a certified copy thereof was mailed to the said trust company (Record, pages 65, 79 and 92). Kneeland and the Farmers' Loan & Trust Company disregarded the order and have not submitted to the jurisdiction of the United States Court nor in any way consented to the exercise of the jurisdiction thereof (Record, pages 79, 80 and 102).

The purchase of Paton and Hartshorne having been assigned to James N. Wallace, the latter, on his petition, was by an order entered July 13, 1900, admitted as a party respondent and the purchasers were dismissed from the record as such purchasers (Record, pages 68 and 70). On July 28, 1900 upon the petition of the Toledo, St Louis & Western

Railroad Company showing that said company had succeeded to the rights of the purchasers at the foreclosure sale, the said company was substituted as petitioner in the place and stead of Samuel Hunt receiver (Record, page 74). Both these orders were made *ex parte*, no notice thereof having been given to any of the parties.

On July 26th, 1900, Jules S. Bache specially appeared under protest for the purpose of filing his plea to the jurisdiction of the court of his person and of the subject matter of the petition (Record, pages 76 to 81). The plea having been set for hearing before Hon. A. C. Thompson, United States District Judge for the Southern District of Ohio, for November 24th, 1900 (Record, page 100), the same was argued and submitted on said day. More than one year thereafter, on December 4th, 1901, Judge Thompson filed his opinion overruling the plea (Record, page 93), and an order to that effect was entered December 14th, 1901 (Record, page 97). Jules S. Bache, having failed to answer said petition, an order was entered April 7, 1902, ordering that said petition be taken as confessed against said Bache (Record, page 100), and on December 4th, 1902, the final decree was entered on the petition adjudging that the prayer of said petition be granted and that the Toledo, St. Louis & Western Railroad Company, as successor to the rights of Samuel Hunt as receiver, and his predecessors in office, is entitled out of the first mortgage bonds and the preferred stock and the common stock in the hands of the respondent, the Farmers' Loan & Trust Company, to be reimbursed, all said amounts with interest thereon from the respective dates of payment thereof, which by the said Samuel Hunt, as such receiver, and by his predecessors in the receivership of the Toledo, St. Louis & Kansas City Railroad Company, have been paid in respect of said prior claims; that said securities be delivered to the said Toledo, St. Louis & Western Railroad Company, and that in default of such de-

livery within thirty days of the entry of this order, the said securities shall stand cancelled and as of no further force or effect as obligations of the said Toledo, St. Louis & Kansas City Railroad Company (Record, pages 101 to 104).

From this final decree this appeal is taken to this court.

Additional Statement.

The foregoing statement of facts is based upon the record as filed in the office of the clerk of this court on December 29th, 1902. On January 18, 1904, a motion was made on the part of the appellee before this court for a writ of certiorari directed to the clerk of the United States Circuit Court for the Northern District of Ohio requiring him to transmit to this court as a part of the record, upon which this appeal is to be heard, the decree of foreclosure and sale entered in said Circuit Court in the suit of the Continental Trust Company against Toledo, St. Louis and Kansas City Railroad Company and others, on April 1st, 1898, and the order of confirmation of sale entered in said Circuit Court in said cause on April 18, 1900. The appellant duly opposed this motion and on January 25, 1904 this court granted said motion *without prejudice*. The writ of certiorari and the return thereto were filed in this court on February 1st, 1904.

As the motion for the writ was granted without prejudice, we respectfully urge our objections to the consideration of the return to the writ as a portion of the record herein on the same grounds as upon the motion.

First.—The appellees are chargeable with laches in not having moved until after the lapse of one year after the filing of the record.

Second.—The decree of foreclosure and the order of confirmation were not made a part of the record in this proceeding. The 16th and 17th assignments

of errors of appellant deal with the action of the court below in considering matters outside of the record. The præcipe for the transcript of the record to the Clerk of the Circuit Court after specifically mentioning the papers to be included therein states: "You will also please include in said tran-"script all entries of any other pleadings, proceed-"ings and papers on your appearance docket in "the matter of the petition of Samuel Hunt, etc., "as aforesaid, and certify to that effect" (Record, page 120). And the clerk's certificate states: "I "further certify that the foregoing transcript con-"tains all the papers which appear noted on the "appearance docket in the above-entitled cause in "the matter of the petition of Samuel Hunt, as "receiver" (Record, page 121).

In *Pacific Railroad* vs. *Missouri Pacific R. R. Co.*, *111 U. S.*, *505*, it appears that in an action brought by one Ketchum, a decree of foreclosure and sale was entered against the railroad corporation, and that subsequently the corporation filed its bill in the same court alleging fraud in the foreclosure suit, and praying that the decree in the Ketchum suit be set aside. On page 518, Mr. Justice BLATCHFORD, delivering the opinion of the Court, says:

The Ketchum record "is no part of the trans-"cript certified from the Circuit Court. The clerk "of that court certifies that what is before us is "'A true transcript of the record in case No. "1,677 of *Pacific Railroad*, plaintiff, against "*Missouri Pacific Railway et al.*, defendants, as "fully as the same remain on file and of record in "said case in my office.' "It follows, that the "record in the Ketchum case was never made "part of the record in this case, so far as "appears from the only record which is be-"fore this court, on this appeal. In regard to the "bill in the Ketchum suit, and the decree, and "the master's deed, and the order approving the "deed, they are made a part of the bill in this "suit, and identified by the annexing of copies. "But the statement in the bill that the plaintiff

" prays liberty to refer to the files and records of " the Circuit Court in the Ketchum suit, to show " such and such things, can be of no force or effect " to allow either party to claim, in this court, the " right to produce or refer to anything, as answer- " ing the description of such files and records, " which it may assert to be such, or as being what " the Circuit Court considered as before it. One " of the assignments of error, on this appeal, is " that the Circuit Court considered matters outside " of the record, and matters not embraced in the " bill. We are of the opinion that *this court can-* " *not consider anything which is not contained in* " *the bill and the exhibits which are annexed to it,* " and that it cannot look into anything otherwise " presented as the files and records of the Ketchum " suit, or of any other proceedings in any court, " for the purpose of determining the questions aris- " ing on the demurrers to this bill."

Third.—The record sufficiently establishes the claim of the receiver, if any he has, to the bonds in controversy. It is covered by the twentieth paragraph of the petition and contains an exact quotation from and including the essential portion of the fourth paragraph of the decree of foreclosure and sale (Return to Writ, page 7). The said twentieth paragraph of the petition reads as follows: " By the terms of said decree of foreclosure and " sale hereinabove set forth, it is adjudged that " said first mortgage of said respondent railroad " company is a lien upon all moneys, profits and " income derived by any receiver in said causes " from the operation of said mortgaged railroad " and property, and all said amounts which have " been so paid in taking up said prior claims and " decrees, have been so paid or will be paid either " out of said mortgaged premises or out of moneys " derived by the receiver from the management " and operation thereof."

Fourth.—The order of confirmation of the sale is sought to be included in the record on account of the statement therein contained " that the distrib-

"ution of the proceeds of sale and all allowances "and compensation are reserved for future "order" (Return to Writ, last paragraph of page 18). The decree of foreclosure itself contains no such reservation. The only questions therein reserved for future determination are: first, what, if any, coupons maturing prior to June 1st, 1893, are outstanding and unpaid; and, second: what, if any, other claims not adjudicated are a charge on the proceeds of sale of the mortgaged property prior in lien to the mortgage debt; third: how the surplus, if any, after making all the payments directed by the decree shall be divided (Sections 4, 5 and 6, Return to Writ, pages 12 and 13). The order of confirmation therefore so far as it makes any other reservation is void and *coram non judice* as attempting to change, alter or enlarge the final decree.

Farmer's Loan & Trust Co. vs. *Newman, 127 U. S., 649, 660;*
Central Trust Co., vs. *Grant Locomo-Works, 135 U. S. 207, 224-5:*
Bronson vs. *Schulten, 104 U. S. 110*
(*Head note by Miller, J.*)

The attempted reservation in the order of confirmation for future order of the distribution of the proceeds is all the more startling in view of the adjudication of the final decree contained in section 5 of the sixth paragraph of the final decree which orders that after the payment of some preferential claims "any residue of the fund realized from "said sale shall be applied to the payment of the "principal of said first mortgage bonds and the "interest and coupons thereon with interest from "the date of this decree to the date of payment." (Return to Writ, page 12).

This adjudication which must be deemed conclusive and which prevented the court below from making any order contrary thereto in the order of confirmation, is based upon the fifth finding of the

final decree which reads in part, "All said first "mortgage bonds so issued are now outstanding "in the hands of divers persons and cor- "porations, who are owners and holders "thereof for value." (Return to Writ page 7) and upon the ninth finding, "The principal of all said "bonds is now due and payable, and there is due "and owing in respect of said first mortgage bonds "at the date of the entry of this decree, the princi- "pal thereof $9,000,000 and for interest thereon, "the following amounts" (Return to Writ, page 8).

It seems to be unquestionable that the order of confirmation cannot make any adjudication in conflict with the provisions of the decree of foreclosure. In fact, it is decreed in said order, in the sentence just preceding the attempted reservation of the distribution of the proceeds of sale, that any residue of the fund realized from the sale after the payment of the preferential claims, shall, in accordance with the decree of April 1st, 1898, be applied toward the payment of the principal of the mortgage bonds and of the interest due thereon. If, therefore, the reservation in the order of confirmation amounts to anything, it can only refer to the distribution of the proceeds among such claims which had not been determined in the final decree, and which therein were reserved for future determination.

Assignment of Errors.

The errors assigned are set out in full on pages 106 to 111 of the Record and may be briefly summarized, viz:

(1.) The Circuit Court erred in overruling appellant's plea.

(2.) The Circuit Court had no jurisdiction of the subject-matter of the 158 bonds referred to in the petition, for the reason that they never were within

its jurisdiction, but, on the contrary, were at the time of the filing of said petition in the possession of the Supreme Court of the State of New York, which tribunal had the exclusive jurisdiction to determine all conflicting claims thereto.

(3.) The Circuit Court had no ancillary or dependent jurisdiction of the subject-matter of the petition by reason of the consolidated suit referred to in the petition after the entry of a final decree therein, and it could entertain jurisdiction, if at all, only by an original suit.

(4.) The Circuit Court had no jurisdiction to entertain the petition or grant any relief thereunder, because it appears on the face thereof that the bonds never were in the possession of the receiver or his predecessors, and that any right of such receivers to their possession, if any there was, had passed to the purchasers at the foreclosure sale prior to the filing of the petition.

5. The Circuit Court had no jurisdiction of the person of the appellant, for the reason that he was never within its jurisdiction and that no proper process was served upon him within the jurisidiction of said court or elsewhere.

6. The Circuit Court had no jurisdiction in the premises by virtue of the alleged reservation of the power of the distribution of the proceeds of sale in the order confirming the sale, for the reason that the court had no power to make such reservation after the final decree of foreclosure.

7. The Circuit Court erroneously took into consideration matters outside of the record.

8. The Circuit Court had no jurisdiction to deal with the bonds in question in the absence of the Farmers' Loan and Trust Company, which was a necessary party to the controversy.

BRIEF FOR APPELLANT.

First.

Before entering upon the discussion of the legal principles involved in this appeal, it may be well to define the status of the bonds and the relations of the parties thereto.

The nine thousand first mortgage bonds together with the common stock issued by the Toledo, St. Louis & Kansas City Railroad Company upon its consolidation, in order to give effect to the provisions of the agreement of January 23rd, 1886, were delivered to two trustees to be delivered by them from time to time to Kneeland, the contractor, as the work which he had undertaken to perform progressed. This work, to wit: the reconstruction of the narrow gauge lines and the equipment of the same, was the consideration for the issue of the bonds and the stock. The payment of the prior claims which Kneeland was obligated to pay, pursuant to the decrees of foreclosure of the narrow gauge divisional lines was not a part of the consideration for the issue of the bonds. Another fund was provided for that purpose, to wit: $1,000,000 of the preferred stock of the consolidated company (Record, page 38, 1st paragraph). At the time of the settlement agreement of June 1st, 1891, Kneeland had failed to comply with some of the obligations imposed upon him by the January 23rd, 1886, agreement, and among other things, had not discharged all of the prior claims. In accordance with the settlement agreement, after the disposition of some of the securities then in the hands of the two trustees for particularly mentioned purposes, the remainder was transferred to the Farmers' Loan & Trust Company to be held in trust as security for the payment by Kneeland of the prior liens and to be delivered by it to Kneeland as fast as he should discharge these claims (Record, page 50). Among these securities were the bonds in question. It

16599

therefore appears that there was no change in the title to these bonds. Before 1891 the legal title was in the two trustees, subject to the withdrawal from them by Kneeland upon his completion of the work of reconstruction and equipment, and after 1891 in the Farmers' Loan & Trust Company, for the purpose of delivering the bonds to Kneeland upon the payment by him of the prior claims. Kneeland had a qualified title from the time of the issuing of these bonds and his absolute ownership thereof was subject to certain conditions precedent.

The several agreements show that the parties thereto considered the ownership of the bonds in Kneeland, though withheld from his possession until the compliance by him with his undertakings. One of the recitals in the June 1st, 1891, agreement "reads: Whereas, the said Kneeland desires to "procure the *delivery* to him of said securities, upon "terms and conditions not precisely within the "provisions of said two agreements of January 23, "1886, and to that end desires that the consent of "the parties of the first part respectively to said "two agreements of January 23, 1886, and of the "two trustees appointed *to take custody of, and* "*to distribute the securities* under said agree-"ments, or their successors in trust, should be ob-"tained to the delivery of said securities" (Record page 47).

It is clear from the agreement of January 23rd, 1886, that the consideration for the issue of the bonded indebtedness of the railroad corporation was the promise of Kneeland to reconstruct and equip the railroad. There is no provision, and it cannot be claimed, that upon failure of Kneeland to comply with his promise, the bonds or a portion thereof should revert to the railroad company. The parties were left to their remedies under the contract, or at most Kneeland could not receive the bonds which he otherwise would have been entitled to from the trustees.

The relation, however, of the parties to the bonds

has been passed upon in the foreclosure case by the Circuit Court for the Northern District of Ohio and on appeal by the Circuit Court of Appeals, from whose opinions we make the following quotations:

Judge TAFT in writing the opinion on some phases of this case, reported in *82 Fed. Rep., 642*, says, at page 655:

"The contractor (Kneeland) became by the plan "of reorganization and the rebuilding, the owner "of much of the common stock and *of the bonds.*"

An attack having been made upon the validity of the entire issue of the bonds under Section 3290 of the Revised Statutes of Ohio, as being sold below 75c. on the dollar, Judge TAFT, disposing of this issue says, at page 659:

"This argument is that *Kneeland* received "$9,000,000 of bonds and $12,000,000 of stock for "an outlay of only $6,000,000 * * * Kneeland's "contract was to do certain work *for $9,000,000 of* "*bonds* and $12,000,000 of common stock."

The very first words of the opinion of Judge TAFT on the final hearing, reported in *86 Fed. Rep. 929* at page 937, read:

"The first question to be considered is whether *the* "*issue by the defendant company of $9,000,000* "*of bonds to S. H. Kneeland* under the contract "of January 23rd, 1886, was in violation of the "Revised Statutes of Ohio."

In discussing the value of the work done by Kneeland, Judge TAFT at page 938 puts the question at issue as follows:

"Were the bonds of the company *sold* for less "than 75 % of their par value? I have read with "care all the evidence * * * in order to de- "termine how much in money's worth the com- "pany received for the "$9,000,000 of bonds *which* "*were issued by it to Kneeland*, the contractor. "Under the contract *Kneeland received $9,000,000* "*of bonds*, $11,250,000 par value of common "stock and $1,000,000 par value preferred stock."

And he winds up his calculation of the value of the work with the words at page 939 :

"It leaves a remainder of $6,897,292 as the *con-*
"*sideration which the Company received for*
"*$9,000,000 of bonds*, or something more than
76 6/10 per cent. of par.

In the tabulated statement on page 939 the Court includes among the payments made by Kneeland $650,247 "for lien claims prior to mortgage". These lien claims include the liens which are made the basis of the claim now before the court. Judge Taft, notwithstanding the non-payment by Kneeland of the portion of this claim took the view that his obligation to pay the sum was a portion of the consideration for the issue of the bonds and that the fact whether he actually did or did not pay the sum had no bearing upon the question.

And the Circuit Court of Appeals adopted the same view. LURTON, J., writing the opinion in *90 Fed Rep., 497*, after discussing Judge Taft's method of calculation uses the following language at page 515 :

"This leaves $6,897,292, which *is the value ac-*
"*tually received by the Company for $9,000,000* or
"76 6/10 of par."

At page 518 the Court says :

"The foundation of the title of the appellant
"railroad company to the property now owned
"and possessed by it was the contract of January
"23rd, 1886, between Kneeland and the bondhold-
"ers committee. The entire issue of bonds and
"stock of the new consolidated corporation was in
"its essence, but the purchase price paid by the
"new company for the railroad in its rehabili-
"tated condition."

The Court of Appeals, however, while agreeing with the calculation of Judge Taft, was of opinion that the proper rule which should be adopted was (page 519).

"The price for which *the bonds were sold* was the "money value of the obligations entered into by "Kneeland; not the money value of the contract "as he performed it but as he was obligated to "perform."

At page 519, in discussing the June 1st, 1891, agreement, the Court says:

"By that agreement, Kneeland acknowledged "his obligation to pay some $600,000 of underlying "liens which are still unpaid. The railroad com- "pany and the bondholders committee agreed that "the trustees, Ingersoll and White *should deliver* "*to him* the bonds and stock remaining in their "hands, to be held to secure his notes executed on "the consideration before stated."

And on page 520 the court referred to the contract of January 3rd, 1886:

"The contract under which *the bonds were sold* "*to Kneeland.*"

From these quotations, it appears that the courts held that all the bonds including those now under consideration passed out of the possession of the railroad company and became the property of Kneeland.

Bache, therefore, as a judgment creditor of Kneeland had an unimpeachable right to proceed against these bonds within the jurisdiction of the New York Supreme Court.

The final decree of foreclosure and sale of April 1st, 1898, affirmed by the decree of November 13th, 1899, and the further decree of January 19th, 1900, adjudged that the principal of all the bonds issued by the Toledo, St. Louis & Kansas City Railroad Company was due and payable, that the bonds were in the hands of owners and holders thereof for value and that at the date of the entry of the decree there was due and owing the principal thereof, viz., $9,000,000 and the interest thereon, amounting in all to $12,028,500. These figures, both as to principal and interest, include the

bonds in question. The decree is conclusive upon the subject so expressly adjudicated, and as it contains no reservation as to the distribution of the proceeds of the sale, it is also conclusive on the point that such proceeds go to all the bonds as between each bond upon a plane of equality. The amount going to each bond is a pure matter of computation which requires no judicial action.

Although there is no suggestion of any amendment of the final decree in that respect contained in the record, the court below in its opinion upholds the jurisdiction of the Circuit Court on the ground that "the proceeds of sale of the mort-" gaged property have not been distributed but are " still under the control of the court. The distri-" bution thereof was expressly 'reserved for future " order' *by the decree confirming the sale*" (Record, page 96). The opinion of the court below not being a part of the record (*England* vs. *Gebhardt*, *112 U. S.*, *502*), such attempted reservation can only be considered if the return to the writ of certiorari be made a portion of the record. In such case, we respectfully refer to the remarks made in this brief on pages 18 to 20.

The theory upon which the receiver proceeds, as gathered from the petition, is found in the 20th paragraph thereof (Record, page 13), which reads as follows:

" By the terms of said decrees of foreclosure and " sale hereinabove set forth, it is adjudged that " said first mortgage of said respondent railroad is " a lien upon all moneys, profits and income de-" rived by any receiver in said causes from the " operation of said mortgaged railroad and prop-" erty, and all said amounts which have been so " paid or will be paid either out of said mortgages " premises or out of moneys derived by the receiver " from the management and operation thereof."

The claim to the bonds which the receiver by his petition asserts is based upon the doctrine of equitable subrogation to whatever rights the railroad

company had against the bonds which were placed in trust with the Farmers' Loan and Trust Co. as security for the contractor Kneeland's performance of the obligation to pay the underlying or prior claims. He having failed to discharge this duty imposed upon him both by the decree of March 10, 1886, in the foreclosure case of the narrow gauge roads and the settlement agreement of June 1st, 1891, and the receiver thereupon having discharged these liens, partially out of the funds in his hands arising from the operation of the road and partially by the issue of receiver's certificates, the moneys in his possession which were covered by the mortgage, were depleted *pro tanto*, and that therefore the funds in the possession of the Farmers' Loan & Trust Company should be applied to reimburse him for such expenditures.

We do not dispute that the receiver, for the benefit of the insolvent corporation, could have established and enforced the right of equitable subrogation to the 158 bonds, if he had acted promptly and had not waived it by inaction as well as by positive acts evincing an intention so to do. But he cannot do it now and in this proceeding.

The petitioners, evidently perceiving this, went a step further by insisting, in the court below, that as soon as the receiver had discharged the prior liens which Kneeland, pursuant to the agreement of settlement, was under obligation to pay, he (the receiver) became immediately and absolutely entitled to these bonds as *assets* of the railroad company. And this contention is made in the face of the opinions of the courts in the foreclosure case and the provisions of the final decree therein entered that *all the bonds were issued and delivered by the railroad company and are due and payable and in the hands of owners and holders thereof for value* (§ 5, Return to Writ, page 7).

But the petitioners by the act of the parties themselves are barred from urging

any such claim ; their rights and remedies are fixed by the agreement of June 3rd, 1891, amendatory of the agreement of settlement of June 1st, 1891. That clause reads as follows:

"Said agreement of June 1st, 1891, shall be and "the same hereby is amended so that it shall be "absolute in its terms, and that the only remedy "of either party, for any breach thereof, shall be "by action founded upon the contract, whether "for damages or for specific performance or other-"wise, as the case may require" (Record, pages 60 and 61).

But the claim of the receiver to these bonds is untenable on more comprehensive grounds. When the predecessor of receiver Hunt was appointed by the several United States Circuit Courts, and duly qualified, all the property of the insolvent debtor within, but no property beyond, the territorial limits of these courts passed to him. It is needless to cite authorities on the proposition that the order of appointment of a receiver has no effect on property without the jurisdiction of the appointing court, and that in the absence of his having reduced the same to possession or of instituting proceedings in the court of the situs of such property to recover the same or enforce his claims thereto, property without the jurisdiction of the appointing court is exempt from any legal authority of the receiver. These bonds had their situs in the State of New York. The receivership of Hunt and his predecessors was not extended to nor was an ancillary receiver appointed of any property of the railroad company within the State of New York. But after Bache, a citizen of the State of New York, has instituted a suit in the court of the situs of the bonds for the judicial seizure of them and their condemnation and application as the property of the defendants or either of them in such suit—the Toledo, St. Louis & Kansas City Railroad Company and Kneeland—to the satisfaction of his judgments against

them, and after a receiver has been appointed by the Supreme Court of New York, who qualified and took possession of the bonds, comes the receiver, Hunt, and institutes the present proceedings for the recovery of these bonds, which were then in the possession of the Supreme Court of the State of New York. And he does that, upon the sole ground that he acquired some shadowy right to the same by virtue of his appointment as common law receiver of the insolvent mortgagor, unaided by any statute enlarging the rights or powers of said receiver as such or his title to the property of the insolvent, and unassisted by any judicial proceeding in any court of the situs of the bonds, or in any other court, save the present proceedings in the court below, subsequent to the sequestration of said bonds by the Supreme Court of New York.

If the fund placed in trust with the Farmers' Loan and Trust Company pursuant to the June 1st, 1891, agreement had not consisted of securities issued by the insolvent railroad company, is it to be supposed for one moment that the same claims would have been advanced by the appellees? And we submit that the issues in this case should be disposed of in the same manner as if this fund had been money, or other securities or obligations issued by any other person or corporation.

Second.

It appears affirmatively from the petition that the bonds were never in the possession of the receiver, Hunt, or his predecessors and that if he had any right or title to the same, it had passed to the purchasers under the foreclosure sale prior to the filing of the petition. The sale, by which the purchasers Paton and Hart-

shorne, acquired the mortgaged premises, is made the basis of this proceeding for the reason that the same included "all the moneys, "profits and income derived by any receiver from "the operation of said mortgaged railroad." This sale took place on March 27th, 1900, and was made absolute on April 18th, 1900, while the petition was not filed until May 28th, 1900. On that date, therefore, the receiver had not the shadow of a claim concerning these bonds and it was beyond the jurisdiction of the Circuit Court to entertain his petition in that respect.

Nor can it avail the appellees anything that the Toledo, St. Louis & Western Railroad Company, as the assignee of the purchasers' bid, was substituted as petitioner in the place of the receiver. At the time when the petition was filed the said railroad company was not in existence, and the order of substitution was not made until July 28th, 1900. No notice of the application thereof was given to this appellant and such substitution was not set up by an amended or supplemental petition. This appellant having been called upon to plead to the petition of the receiver, has the right to disregard all proceedings subsequent thereto unless properly incorporated in the petition, and it was error on the part of the court below to do so and to entertain jurisdiction of the petition with the Toledo, St. Louis & Kansas City Railroad Co. as substituted petitioner.

Empire Distilling Co. v. *McNulta*, 77 *Fed. Rep.*, 700.

Third.

It is unnecessary to cite authorities on the proposition that the Circuit Courts of the United States are courts of limited, though not inferior, juris-

diction and that hence in a proceeding commenced in that court, the bill must allege the facts conferring jurisdiction. Inasmuch as the petition failed to allege the residence or citizenship of Bache while the plea affirmatively shows that Bache was a citizen and resident of the State of New York and without the jurisdiction of the United States Circuit Court for the district of Ohio, the only contention of the appellees in the court below in maintaining the jurisdiction of the Circuit Court was that irrespective of the citizenship or residence of the respondents jurisdiction attached to the proceeding as an ancillary or dependent proceeding supplementary to the original suit out of which it had arisen on the ground that the appellant Bache was a party to such original suit, and the court below, in its opinion, adopted this view (Record, page 96).

The petition, however, does not state that Bache was a party to the original suits, and, in fact, his name or his connection with the controversy is neither mentioned nor in any way referred to. The plea also is silent as to any connection of the appellant Bache with the suits referred to in the petition and it is significant that the order to plead to the petition, directed by Judge Thompson to be served by mail, does not contain any direction to mail the same to the appellant Bache, though as a matter of fact the same was mailed (Record, pages 64-65 and page 91).

A bill must point out with certainty the parties complainant and respondent clearly designating the persons named as defendants by distinct allegations and by prayer of process and a failure to do so is fatally defective.

Elmendorf vs. *De Lancey*, *Hopk. Ch.*, *555*.

Verplanck vs. *Mercantile Ins. Co.*, *2 Paige*, *438*.

Kentucky Silver Mining Co. vs. *Day*, *2 Sawy.*, *408*.

The Courts have extended this rule to hold that under Equity Rule 23 an omission in the prayer of process or subpœna of the names of some of the defendants named in the introductory part of the bill is a violation of the above rule and is a fatal defect.

Goebel vs. *American Railway Supply Co., 55 Fed. Rep., 825.*

Nor does the final decree of foreclosure state that Bache was a party to the original suit. The only reference to Bache occurs in the 11th paragraph of the decree, whereby the amended intervening petition of Bache and others is dismissed (Return to Writ, page 15).

(*b.*) Although the Farmers' Loan & Trust Company was appointed receiver of the bonds in controversy by the Supreme Court of the State of New York prior to the filing of the petition herein, and had actual possession of said bonds, this was studiously ignored by the petitioners and the court below, and no attempt was made to make such receiver party. That this was absolutely necessary in order to confer jurisdiction on the Circuit Court over the subject matter, although it could have been done only with the permission of the New York Supreme Court, admits of no debate.

Porter v. *Sabin, 149 U. S., 473.*

However, an attempt was made to bring in as a party the Farmers' Loan & Trust Company as trustee of the bonds, although it never was a party to the foreclosure or creditors' suits. But the trust company, having failed to appear and its default having been set up in the plea of this appellant as a bar to the Circuit Court's jurisdiction, the court below disposed of this objection by holding that the trust company was not a necessary party and had no interest in the bonds, notwithstanding the

allegations to the contrary that the same claimed a lien on said bonds (Record, page 88).

This court, however, has held that a stakeholder, though disclaiming any interest in, or lien, upon, the property in his possession is a necessary party to a controversy concerning the same and that the objection can be taken by any of the defendants. We quote in full the opinion of Mr. Justice BREWER in

Massachusetts & Southern Construction Co. vs. *Kane Creek Township*, *155 U. S., 283.*

"The plea to the jurisdiction should have been "sustained. The substantial object of the suit was "to obtain possession of the bonds. The Deposit "& Trust Company was the party in possession, "and, although it claimed no interest in the bonds "as against the plaintiff and its co-defendant, yet "possession could not be enforced in favor of the "plaintiff except by a decree against it. Where "the object of an action or suit is to recover the "possession of real or personal property, the one "in possession is a necessary and indispensable "(and not a formal) party. The case of *Wilson* v. "*Oswego Twp.*, *151 U. S.*, *56*, is decisive on "this point. In that case a suit was commenced "in a state court in Missouri to recover possession "of certain bonds in the custody of the Union Savings Association. There were several defendants, "among them one Montague, and an intervenor, "Oswego township, who, claiming the bonds, removed the case on the ground of diverse citizenship to the federal court. Such removal was adjudged to be erroneous, this court holding "that 'the Union Savings Association, being the "bailee or trustee of the bonds, was a necessary "and indispensable party to the relief sought by "the petition, and that defendant, being a citizen "of the same state with the plaintiff, there was no "right of removal on the part of Montague, or of

16605

" the intervening defendant, the Oswego township,
" on the ground that the Union Savings Association,
" was a formal, unnecessary, or nominal party.'

" Further comment is not required. The decree
" of the Circuit Court must be reversed, and the
" case remanded, with instructions to sustain the
" plea, and to dismiss the bill for want of juris-
" diction."

Fourth.

That the bonds in question were and since June 1891 (a long time prior to the institution of the general creditors' and foreclosure suits in the United States Circuit Court in which the appellee Hunt and his predecessor receivers were appointed) had continuously been in the actual possession of the Farmers' Loan & Trust Company, a New York corporation in the State of New York and outside the territorial limits of the jurisdiction of the United States Circuit Courts in which both suits were pending is undeniable. It is likewise undeniable that the appellant Bache instituted a suit in the Supreme Court of the State of New York for a judicial seizure of the bonds and the condemnation and application to the satisfaction of his joint judgments against the Toledo, St. Louis & Kansas City Railroad Company and S. H. Kneeland, and that in such suit the Supreme Court of the State of New York appointed a receiver who qualified under such appointment and took possession of said bonds and that thereafter the receiver Hunt instituted the present proceedings in the United States Circuit Court for the Northern District of Ohio, wherein he prays for a decree that these bonds be delivered over to him. The decree which was entered on his petition, among other things, orders that said bonds be thus delivered to the Toledo, St. Louis and Western Railroad Company.

The subject matter of the controversy between the appellant and the appellees is the 158 bonds, which prior to any proceedings taken by the appellees were judicially seized and held by the Supreme Court of the State of New York. Under these circumstances it was improper for the United States Circuit Court to entertain the petition and enter the decree which it did, and it acted without jurisdiction.

(*a.*) This court has uniformly held in all the cases in which there was a conflict of jurisdiction between the United States Courts and the State Courts, that *possession* of the property determined the jurisdiction and that when possession is obtained by one court subsequent to the possession of another court, the court having obtained the prior possession must retain the controversy. *Not the title to the property but the possession thereof, not the right to possession but the actual possession is decisive.*

One of the earliest cases, and one very similar to this case, is *Beaston* vs. *Farmers Bank, 12 Pet., 102*, affirming the judgment of the Court of Appeals of Maryland, the opinion of which is reported at pages 107 *et seq.* It appeared among other things that in April, 1830, a bill in equity was filed by the United States in the United States Circuit Court against the bank and receivers were appointed to take possession of the property of the bank, to dispose of the same and collect its assets. In the month of September following in an action in the state court the sheriff attached the bank's property in the hands of the garnishee of the bank. The claim having been made that the prior appointment of the receivers in the United States court action invalidated the attachment of the sheriff, the court at page 110 held that the subsequent attachment was valid for the reason that the receiver had not taken possession of the property in the hands of the garnishee.

In the leading case of *Taylor* vs. *Caryll, 20 How.*,

583, an attachment was issued from the state court and levied on a vessel which was seized thereunder. Subsequently a libel was filed against the same vessel in the federal court. The vessel was sold under the judgment of each court. This court held that as the state court first seized the vessel it could not be divested of its power over it by the subsequent proceeding of the federal court, though it was a case in admiralty, and that the purchaser at the sale under the state court judgment acquired the better right. It is said:

"The Court of Chancery does not allow the pos-
" session of its receiver, sequestrator, committee or
" custodee, to be disturbed by a party, whether
" claiming by title paramount, or under the right
" which they were appointed to protect, as their
" possession is the possession of the court."

Freeman v. *Howe*, *24 How., 450*, following *Taylor* v. *Caryll*, reiterates the doctrine that in the case of conflicting authorities under a state and federal process. in which property has been seized, the question as to which authority shall for the time prevail, does not depend upon the rights of the respective parties to the property seized, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process. The court cites with approval the opinion in *Peck* v. *Jenness*, *7 How., 624*, to the effect that "Neither can one (court)
" take the property from the custody of the other
" by replevin, or any other process; for this would
" produce a conflict extremely embarrassing to the
" administration of justice."

In *Covell* v. *Heyman*, *111 U. S., 176*, it appears that a United States marshal who had seized property under a judgment of the Circuit Court, was sued in replevin in the state court by the rightful owner thereof. This court held in conformity with *Freeman* v. *Howe* that the possession of the United States marshal prevented the state court from

exercising jurisdiction, without regard to the rightful ownership.

In *Byers* vs. *McAuley*, *149 U. S., 614*, a decedent's estate was in course of administration in the state court. Subsequently a bill in equity was filed in the United States Circuit Court by a claimant to the estate. This court held that though the United States Circuit Court could not interfere with the possession of the estate in course of administration in the state court, it could determine claims made by non-residents of the state.

At page 614 the court says:

> "It is a rule of general application that
> " where property is in the actual possession of
> " one court of competent jurisdiction, such
> " possession cannot be disturbed by process
> " out of another court. The doctrine has been
> " affirmed again and again by this court".

Moran vs. *Sturgis*, *154 U. S., 257*, was a case involving the priority of seizure of certain steamboats between the United States marshal and the state court receiver.

At page 274 the court says:

> "It is a rule of general application that
> " where property is in the actual possession of
> " one court of competent jurisdiction such pos-
> " session cannot be disturbed by process out of
> " another court. This doctrine has been re-
> " peatedly affirmed by this court".

In *Shields* v. *Coleman*, *157 U. S., 108*, a receiver in the federal court after having taken possession of the property, accepted a bond in lieu thereof and turned it back to the owner. Subsequently a receiver appointed by the state court took possession thereof, but the same was taken out of his hands by the receiver appointed in the United States Circuit Court. This was held improper. On page 178 Mr. Justice BREWER delivering the opinion of the court says: "When the court "* * * made the appointment, that appointment

"could not be questioned by another court, or the "possession of the receiver thus appointed be dis- "turbed."

In *Ex parte Chetwood, 164 U. S., 443*, the following language is used: "The doctrine is firmly "established that where the jurisdiction of a "court, and the right of a plaintiff to prosecute "his suit in it, have once attached, that right can- "not be arrested or taken away by proceedings in "another court, and that where property is ac- "tually in possession of one court of competent "jurisdiction such possession cannot be disturbed "by process out of another court of concurrent "jurisdiction" (page 460).

Two cases decided by the Court of Appeals of the State of New York are very instructive on the question of jurisdiction as pointing out the difference between the right on the part of a receiver to take possession and his actual possession. In *Walling* vs. *Miller, 108 N. Y., 173*, it appeared that in a judgment creditor's action a receiver was appointed of some of the debtor's property, who took possession thereof and subsequently sold the same. Suit having been begun against the purchaser by another judgment creditor a prior lien was asserted on the ground that prior to the appointment of the receiver the sheriff had levied upon the property and that a sale was had thereunder. The court held that the sheriff's sale was void, for the reason that the property, though levied upon by the sheriff, was not taken into his custody, and that the possession was decisive. In *Varnum* vs. *Hart, 119 N. Y., 101*, it appeared that the sheriff not alone levied upon the property, but took the same into his possession, and that after the appointment of a receiver he sold the same. The court held that the sheriff's sale was not void, and could at most be held to be irregular.

A full discussion of the conflicting jurisdiction between state and federal courts and a review of the authorities are found in the case of *Knott* vs.

Evening Post Company, 124 Fed. Rep., 342, where Judge Evans makes the following summary of the matter:

"Wherever suits are pending in two or more "courts of concurrent powers, in each of which, at "the instance of different plaintiffs, it is sought to "control or to subject to the demands of creditors "the same property, that court alone has the right "to do so which first gets the property within its "grasp by some recognized mode of judicial seiz- "ure, and that, too, without regard to the question "of which suit was first instituted. The mere pri- "ority of commencement of litigation is not, "but the priority of judicial seizure is, the "test of jurisdiction over the *res* in all cases "where property is the subject of contention. "This test is simple, direct, and practical, and "draws a line which is palpable. It is of easy "solution, and cannot be open to serious mistake. "Being established as the true test, it obviates the "need to any resort to mere theories, and leave "the court, which in fact and presumably always "properly, brought the property itself *in gremio* "*legis*, to administer or control it to the "exclusion of all other courts, and without "leaving open the possibility of unseemly "wranglings with any person who may have "been disappointed in his later efforts. Some "test must be recognized by all, and the palpable "and practical one of first judicial seizure is "not only convenient but wise." * * * "Where different individuals, acting upon the "right plainly possessed by each to choose a "forum, go into different courts to enforce differ- "ent rights against the same property, we have a "case which calls into play and operation the "principles upon which the pending motion must "be determined. It is in such cases that what is "called a 'conflict of jurisdiction' arises, and in "which the doctrine of judicial comity must have "sway. That comity, being based upon common "sense, should not be manifested in mere courteous "surrenders of what somebody else asks, but "should, as the word implies, be a recognition of "the just rights of another court, as those rights "may be ascertained upon established principles. "It does not ordinarily depend upon the question

"of which suit was first brought, nor upon priority "of service and process, for these matters may, "from the nature of the litigation, affect only the "question of jurisdiction over the person, and "which, *per se*, cannot concern litigants in other "causes in other courts. Where different plaint- "iffs lawfully choose different forums to enforce "different rights, the question of priority of ser- "vice of of process so as to give jurisdiction of the "person of the defendant would be abstract and "immaterial as to the suits of third parties, unless "property was seized; but if the same property is "seized by the process of both courts, then, as only "one of them can control it, some test must be "found for ascertaining which of them shall do so, "and it is believed that no case of this sort can be "found in the courts of the United States, at least, "in which any test was acted upon except that of "prior judicial seizure. Where the question, "therefore, is one of jurisdiction over the *res*, "and not merely over the person, its solution must "logically and necessarily depend upon the prior- "ity of custody of the *res* which both courts are "asked to control. If we have been right in sup- "posing that jurisdiction over the *res* can only be "acquired by some form of judicial seizure—some "form of procedure by which it is actually brought "within the grasp and custody of the court—then "the inquiry admits of no difficulty."

(*b.*) Even though it be assumed for the purpose of argument, that the appellee receiver had an absolute or prior right to the possession of the 158 bonds, the fact that they were in the actual possession of the state court through judicial seizure, barred the Circuit Court from entertaining jurisdiction of the receiver's petition.

The rule is laid down in *Daniel's Chancery Practice* as follows, on page * 1057:

"When any person claims to be entitled to an "estate or other property sequestered, whether by "mortgage or judgment, lease or otherwise, or has "a title paramount to the sequestration, he should "apply to the court to direct an inquiry whether "the applicant has any and what interest in the "property sequestered. This inquiry is called an "examination *pro interesse suo*."

And at page * 1743, *et seq.*, the learned author applies the same rule to the case of receivers, as follows:

"The possession either of receivers or sequestrators is not to be disturbed without leave; and the same rule will be *acted on in cases where* the receiver has been appointed erroneously or without prejudice to the rights of persons having prior charges."

In *Wiswall* vs. *Sampson*, *14 How*, *52*, the court says at pages 65 and 66:

"When a receiver has been appointed, his possession is that of the court, and any attempt to disturb it, without the leave of the court first obtained, will be a contempt on the part of the person making it. This was held in *Angel* vs. *Smith*, *9 Ves.*, *335*, both with respect to receivers and sequestrators. When, therefore, a party is prejudiced by having a receiver put in his way, the course has either been to give him leave to bring an ejectment or to permit him to be examined *pro interesse suo* and the doctrine that a receiver is not to be disturbed extends even to cases in which he has been appointed expressly, without prejudice to the rights of persons having prior legal or equitable interests, and the individuals having such prior interests must, if they desire to avail themselves of them, apply to the Court either for liberty to bring ejectment or to be examined *pro interesse suo;* and this though their right to the possession is clear. * * * A party therefore holding a judgment which is a prior lien upon the property, the same as a guarantee, if desirous of enforcing it against the estate after it has been taken into the care and custody of the court, to abide the final determination of the litigation and pending that litigation, must first obtain leave of the court for this purpose. The court will direct a master to inquire into the circumstances, whether it is an existing unsatisfied demand or as to the priority of the lien, etc., and take care that the fund be applied accordingly."

In *Covell* vs. *Heyman*, *supra*, on page 179 the court says:

"The point of decision in *Freeman* vs. *Howe*, "*supra*, is that, when property is taken and held "under process, mesne or final, of a court of the "United States, it is in the custody of the law and "within the exclusive jurisdiction of the court "from which the process has issued for the pur- "poses of the writ; that the possession of the "officer cannot be disturbed by process from any "state court, because to disturb that possession "would be to invade the jurisdiction of the court "by whose command it is held, and to violate the "law which that jurisdiction is appointed to ad- "minister; that any person, not a party to the "suit or judgment whose property has been wrong- "fully, but under color of process, taken and with- "held may prosecute by ancillary proceedings, in "the court whence the process issued, his remedy "for restitution of the property or its proceeds "while remaining in the control of that court, but "that all other remedies to which he may be en- "titled against officers or parties, not involving "the withdrawal of the property or its proceeds "from the custody of the officer and the juris- "diction of the court, he may pursue in any "tribunal, state or federal, having jurisdiction "over the parties and the subject matter. And *vice* "*versa* the same principle protects the possession "of the property while thus held, by process issu- "ing from state courts, against a disturbance un- "der process of the courts of the United States; "excepting, of course, those cases wherein the "latter exercise jurisdiction for the purpose of "enforcing the supremacy of the constitution and "laws of the United States."

This extract from the opinion was quoted with approval in *Byers* vs. *McAuley*, *supra*, and *Moran* vs. *Sturgis*, *supra*.

In *Gumbel* vs. *Pitkin*, *124 U. S.*, *131*, an attachment having been issued out of the state court, but before the seizure of the goods thereunder by the sheriff, the United States marshal on the following day (being Sunday), under color of process issued on that day, took possession of the property. The court held that "for the reasons growing out of "the peculiar relation between federal and state

"courts exercising co-ordinate jurisdiction over "the same territory, the Circuit Court acquired "exclusive jurisdiction to dispose of the property "brought into its custody under color of its author- "ity, although by illegal means, and to decide all "questions of conflicting rights thereto," and that the attaching creditor in the state court properly intervened in the federal court for the protection of his rights.

If, therefore, the receiver and the purchaser desired to contest the claim made by Bache against the bonds in the judicial custody of the Supreme Court of the State of New York, or if they themselves asserted any right, title to or interest in said bonds, it could only be done by intervention in the suit brought by Bache in the state court.

Krippendorf vs. *Hyde*, *110 U. S.*, *276*.

(*c.*) It may be admitted that under certain conditions the United States Circuit Court would have jurisdiction over the controversy concerning these bonds, but only if Bache or the Farmers' Loan & Trust Company had chosen that forum for the purpose of procuring the *pro rata* share due on these bonds under the decree of foreclosure. But neither the Farmers' Loan & Trust Company nor Bache has made any such claim and neither the receiver nor the purchaser has the right to anticipate such a contingency and prevent Bache from asserting his equitable lien upon these bonds before such forum as he desires. That independently of any other consideration, he could do this, is unquestionable. These bonds were never in the custody of the United States Court and therefore as this Court said in *Shields* vs. *Coleman*, *supra*, at page 199, they are

"Subject to any rightful disposition by the "owner or to seizure under process out of any "court of competent jurisdiction".

The fact that the United States Circuit Court

had jurisdiction of the foreclosure case does not give that court the exclusive right to draw to itself all questions remotely or in any way connected with the main issues. And if the contention of the appellees be upheld, that such jurisdiction attaches, even after a final judgment and the disposal of all the issues in the main case, it would amount to jurisdiction in perpetuity. Even though, which we deny, the United States Circuit Court had under its control at the time when these proceedings were instituted, jurisdiction of the assets from the sale under foreclosure, it does not follow that for that reason no other court can entertain jurisdiction of matters connected with the prior litigation as long as it does not result in any disturbance of the possession which the court has of the property.

In *Buck* vs. *Colbath*, *3 Wall.*, *334*, Mr. Justice MILLER delivering the opinion of the court, says on page 341:

"It is only while the property is in possession of "the court either actually or constructively that "the court is bound, or professes to protect that "possession from the process of other courts. "Whenever the litigation is ended, or the possession of the officer or court is discharged, other "courts are at liberty to deal with it according to "the rights of the parties before them, whether "those rights require them to take possession of "the property or not."

And on page 345:

"It is not true that a court having obtained jurisdiction of a subject matter of a suit, and of "parties before it, thereby excludes all other "courts from the right to adjudicate upon other "matters having a very close connection with those "before the first court, and, in some instances, requiring the decision of the same questions exactly. In examining into the exclusive character "of the jurisdiction of such cases, we must have "regard to the nature of the remedies, the character of the relief sought, and the identity of the "parties in the different suits."

To the same effect are *Yonley* vs. *Lavender*, *21 Wall.*, *276*, and *Byers* vs. *McAuley*, *supra*.

Heidritter vs. *Elizabeth Oilcloth Co.*, *112 U. S.*, *294*, holds that where the purpose of the second suit is the enforcement of a lien which is claimed to have attached to the property before the institution of the first suit or before the lien sought to be enforced therein, such proceedings may be taken in the second suit as are necessary to preserve such lien without interfering with the possession of the property.

In the very recent case of *Baer* vs. *McCullough*, *176 N. Y.*, *97*, Chief Judge PARKER announced an analogous rule as follows:

"But while Congress intended to permit the "establishment of claims against the fund in the "hands of the receivers to take place through the "ordinary local judicial machinery, it could not, of "course, tolerate an attempt on the part of such "courts to take possession of such of the fund or "property in the hands of the receivers as would "be necessary to the satisfaction of the claims. "Only one court could tbe permitted to operate "the property, marshal the assets, decree a sale "and provide for the distribution of the assets "among those entitled thereto, and hence it was "deemed necessary to establish the boundary line "beyond which state courts could not go. Such a "construction is in harmony with the decree made "by the federal court in this case. True, it pro-"vided for a method by which claims against the "fund could be ascertained, but it did not provide "that such method was exclusive, nor do we think "it could have so provided in view of the language "of the statute authorizing the commencement of "suits without its consent, for if it could take to "itself exclusive jurisdiction to establish claims "against the fund by decree made at the close of "the litigation, it could also do it at the outset of "the litigation, and in such case the authority con-"ferred by statute upon other courts to take juris-"diction of actions brought against the receivers "would be without effect, and, of course, the stat-"ute cannot thus be brushed aside.

"The decree of the federal court in this case was "made on broader lines—lines more convenient for

" the litigant and in harmony with the statute. It " assured the creditor that his claim, whether " established or not at the time of the sale of the " property, should be paid and it did not attempt " to take from him the right, plainly given him by " the statute, to select the court most convenient " to him, and it reserved to the federal court, in " the interest of all the creditors, the right to pro- " ceed at the foot of the decree to make such fur- " ther order as might be necessary to carve out of " the property or take from the fund such sum as " should be necessary to satisfy all claims estab- " lished through the proper legal machinery pro- " vided either by the state or federal government " in the event that the purchaser of the property, " the Erie Railroad Company, should fail to pay " the claims."

One of the earliest cases in which the entire subject of conflicting jurisdiction is discussed is *Wilmer* v. *Atlantic & Richmond Air Line Ry. Co., 2 Woods, 409*, which, in many of its phases, is very much like the case at bar. The principles laid down in that case, though at first adversely commented upon in some judicial opinions, have been approved by this court in the cases hereinbefore cited. We append the following extracts:

On page 425. " The question remains pure and " simple, Does the priority of commencing suit in " this court for the foreclosure and sale of the " mortgaged premises give the court constructive " possession of the property so as to nullify the " subsequent possession taken by the state court, " the respective objects of the two suits being dif- " ferent? It is too well settled to admit of con- " troversy that where two courts have concurrent " jurisdiction of a subject of controversy, the court " which first assumes jurisdiction has it exclusive " of the other. But where the objects of the suits " are different, this rule does not apply, although " the thing about or in reference to which the liti- " gation is had is the same in both cases. Thus, " an action of debt on a bond, an action of eject- " ment on the mortgage given to secure it, and a bill " in equity to foreclose the equity of redemption " may be pending at the same time unless prohibited " by some statutory regulation. The land mort-

"gaged may be seized in execution by the sheriff in "an action at law, even while the ejectment or the "bill to foreclose is pending. A bill to foreclose is "a personal proceeding, although it has reference "to a specific thing. Its object is to put an end to "an existing equity, and to procure a sale of the "mortgaged premises. Possession may be taken "in the course of proceedings, but until it is taken, "can it be said that the property is sacred from the "touch of other persons or courts? The present "case, then, is resolved to this: Had the Fulton "County Court power to appoint a receiver, and "place him in charge of the property, whilst a "bill to foreclose was pending in this court; or "was it an interference with the jurisdiction of "this court?"

After stating that though the controversy before the state court was different from that before the federal court, both had for their ultimate object the possession of the railroad in question, and that, therefore, a conflict of jurisdiction as to the thing or subject-matter had arisen, the court proceeds at page 427: "The test I think is this: Not which "action was first commenced, nor which cause of "action has priority or superiority, but "which court first acquired jurisdiction "over the property. If the Fulton County "Court had the power to take possession "when it did so, and did not invade the possession "or jurisdiction of this court, its possession will "not be interfered with by this court; the parties "must either go to that court and pray for the re- "moval of its hand, or having procured an adjudi- "cation of their rights in this court, must wait "until the action of that court has been brought "to a close, and judicial possession had ceased. "Service of process gives jurisdiction over the "person. Seizure gives jurisdiction over the prop- "erty; and until it is seized, no matter when the "suit was commenced, the court does not have "jurisdiction."

While some cases may be found which criticise the severity of the doctrine, that actual possession is the prerequisite for the exercise of exclusive jurisdiction, and favor the application of the rule

that potential or constructive possession acquired by a prior action is sufficient, yet even this view is conditioned upon the power of the court to take actual possession by virtue of its own process, and has no application to a case, as is this one, where the *res* in dispute is in a foreign sovereignty and incapable of being reduced to possession, either actually or constructively, save with the help of the foreign court. *In all the cases cited, the property was within the territorial limits of both the federal and state courts and capable of seizure by either of them.* An examination of the authorities fails to reveal one single instance where the jurisdiction of one court was maintained for the purpose of interfering with property in the judicial custody of a court beyond the territorial limits of the former.

No matter how sweeping the powers of the equity jurisdiction have been determined to be in the administration of assets under its control, it has always halted at property in the possession of a foreign court. This limitation was clearly enunciated in the case of *Borer* v. *Chapman*, *119 U. S.*, *587*, which contains an elaborate discussion of the powers of the court in cases involving administration of estates. After enumerating the wide powers of the court in such cases, it is said, on page 600:

> "*The only qualification in the application of* "*this principle is that the courts of the United* "*States, in the exercise of their jurisdiction over* "*the parties, cannot seize or control property* "*while in the custody of a court of the State.*"

Since the decision of *Booth* v. *Clark*, *17 How.*, *322*, it is settled beyond dispute that *a foreign receiver acquires no title to property until he has actually taken control thereof* by proceedings in the courts of the state of its situs.

This proceeding by the receiver Hunt of reaching out for property in charge of the New York Supreme Court without its sanction, is a flagrant

violation of one of the most firmly established principles of both the state and federal courts that one court cannot interfere with the possession of property in another court, and such unauthorized interference is a direct contempt of the New York Supreme Court.

Fifth.

In view of the nature of the foreclosure case and its status when the present proceedings were instituted by the receiver, the Circuit Court had no power or jurisdiction to entertain the same. The real controversy on the merits between the receiver and the Toledo, St. Louis & Western Railroad Company on the one hand and Bache, on the other, is which of the parties has a superior title or claim, whether equitable or legal, to the bonds. The enforcement of such right is a matter wholly foreign to and entirely disconnected with the foreclosure case or its subject matter and cannot be tacked on to such suit by the filing of the petition under the same title as such suit and made the subject of the ancillary, auxiliary or incidental jurisdiction of the Circuit Court in that case.

It is said in *Gibson, Suits in Chancery* § 776:

"To allow a third person to inject new matter "into a litigation, not germane to the issues "presented by the pleadings would be to allow in- "terminable confusion, incongruous issues, and "general multifariousness, wholly at variance with "every principle of true pleading, and tending in- "evitably to vexatious perplexity, alike to the "litigants and to the Chancellor. For these rea- "sons, no intervention should be allowed in any "case where the new matters sought to be in- "troduced are irrelevant, multifarious, incongruous "or otherwise proper for an original bill. * * * "It may be stated, as a general rule that no mat-

" ter should be allowed to be introduced into a " cause by a petition which is (1) proper matter for " an independent original bill (2) which could be " brought forward by an amended or sup- " plemental answer, or by a cross-bill on " the part of the defendant; or (3) " which, if contained in the bill, would make it " multifarious, or if set up in the answer would be " impertinent and no defense; or (4) which would " tend to create confusion, perplexity or delay " without any compensating advantage."

It seems to be clear that the receiver could not have such aid from the Circuit Court concerning these bonds as he now demands, assuming that it could at all have been granted in the foreclosure case, without an amendment of the pleadings or the filing of a supplemental bill during the pendency of the cause. Having failed to do this, he now files this petition on behalf of the purchasers at foreclosure sale, after the foreclosure suit has not only gone to a final decree, but after there has been a sale thereunder which has been confirmed by the court and made absolute. After all the issues in the main case are finally disposed of, a new and distinct litigation is sought to be started by the receiver under the guise of the foreclosure case by giving its title to his petition.

In *Smith* vs. *Woolfolk*, *115 U. S.*, *143*, the court holds that in a suit in equity brought by creditors against the administrators of a deceased debtor (Craig) for the settlement of his estate, after the entry of a decree ordering the sale of his estate and the distribution of the proceeds thereof, and after confirmation of the receiver's report, one of the complainants in the original suit (Todd) cannot file a petition in such suit praying that proceeds of certain property should be applied to the claim of some creditor other than that of one of the co-complainants (Woolfolk) who had received the same and that said co-complainant account therefore. The court says :

"We are of opinion that the decree of the Chicot "Circuit Court made on the 28th day of October, "1868, was, so far as it concerned Joseph H. Wool- "folk and Lucie D. his wife, a final decree in the "cause, and they were bound to take no notice of "the subsequent proceedings, unless they were "served with process or entered their voluntary "appearance. By that decree the rights of the "parties then before the court, as stated in the "original bill, and all the assets of the estate of "Craig actually or constructively within the juris- "diction of the court, were disposed of. * * * "Even if the decree made on the original bill was "not final, the petition filed by Todd was so radical "a departure from the case made and relief prayed "by the original bill as to be a new suit "and require service of process on the parties "made defendant thereto. It instituted a new "litigation on new and distinct issues not raised "by the original pleadings, and between parties "who were complainants in the original cause. "* * * *After a decree disposing of the issues "and in accordance with the prayer of a bill had "been made, it is not competent for one of the "parties, without a service of new procees or ap- "pearance, to institute further proceedings on "new issues or for new objects, although con- "nected with the subject-matter of the original "litigation by merely giving the new proceedings "the title of the original cause.* If his bill begins "a new litigation, the parties against whom he "seeks relief are entitled to notice thereof and "without it they will not be bound."

The principle of that case was re-affirmed in *Great Western Telegraph Co.* vs. *Purdy, 162 U. S., 329, 335.*

In Bowen v. *Christian, 16 Fed. Rep., 729,* a receiver appointed in a suit to wind up a partnership, filed a bill to set aside certain mortgages upon the partnership property as fraudulent and obtained an order for substituted service upon the attorney in fact of the mortgagees. BROWN, J., writing the opinion, says:

"In this case defendants are not parties to the original suit. They are simply lienholders of the property in the possession of this court.

This bill is clearly an original bill, since it relates to a matter not before litigated in this court by the same persons. As Mr. Justice STORY says: 'Bills not original are those which 'relate to some matter already litigated in the 'court by the same persons, and which are 'either in addition to, or in continuation of, an 'original bill or both.' Eq. Pl. § 16. The bill is undoubtedly a continuation and carrying forward to some extent, of the original suit, since, in order to fix the amount of Mr. Nichol's interest in the partnership assets, it is necessary to determine the validity of these mortgages. But none of the parties to this suit are parties to the other. The bill is no less an original one because it happens to be an outgrowth of the others."

In *Sheffield, &c., Railway Company* v. *Newman*, *77 Fed. Rep., 787*, after a foreclosure of a railroad mortgage and the sale of the property subject to the lien of receiver's certificates reserving, however, to the purchasers the right to contest the validity thereof upon a proper case being made by parties in interest, one of such certificate holders brought suit.

The Court says; at page 793:

"Appellant's contention, with regard to that "part of the property which was sold to satisfy "the Woodson certificates, raises a question which "must be decided from a standpoint somewhat dif- "ferent. To the proceedings which resulted in "that decree, the appellee was not made a party. "The decree only provided for the payment of a "part of the certificates, the contest as to the "validity of which had been previously allowed in "the original cause. The appellants urge that "although appellee was not an actual party, "he was a privy, because the proceedings on the "Woodson certificates was a continuation of an "issue in the original cause. This contention is "without force. The case to be made under "the reservation as to the Woodson certificates "was a case to be litigated between the parties in "interest, viz., the future purchasers (who were "unknown at the time the reservation was made)

" and the holders of the Woodson certificates. " The future purchasers were the only parties in " interest authorized to resist payment of those " certificates. The suit was not brought on behalf " of any other certificate holders. The proceed- " ings against the purchasers alone amounted, " therefore, to an original suit. It has been held " that where a bill does not relate to some matter " already litigated in the same court by the same " person, it is an original bill, and not ancillary to " the original suit."

Christmas v. *Gaines*, *14 Wall*, *69*, was an action by plaintiff to recover on notes held by him and a mortgage given to secure the same. The sureties in an error bond by the plaintiff having been given a lien on said note by the plaintiff, filed a bill claiming subrogation to the notes. The court held that the bill was an original one and not one auxiliary or ancillary to the action.

Krippendorf v. *Hyde*, *110 U. S.*, *276*, announces no principle in conflict to this proposition. There the court had possession of the fund, and a party claiming the fund in hostility to the plaintiff in that suit intervened for the purpose of establishing his right to the same. Here neither the bonds in question nor the distributive share of the proceeds of sale to which the owners thereof are entitled are, or have been, within the jurisdiction of the Circuit Court.

In *Coburn* vs. *Cedar Valley Land & Cattle Co.*, *138 U. S.*, *196*, a settlement of the pending suit having been set up by petition and a decree rendered thereon, Mr. Chief Justice FULLER, delivering the opinion, says at page 223:

" It is objected that the decrees in question were " improperly rendered, for want of jurisdiction to " proceed upon the petitions. Undoubtedly the " ordinary rule would have required the matter of " the settlement to be presented by a supplemental " bill or cross-bill or a bill in that nature; and " these decrees were rendered upon petition only. " But this objection was not raised until after a

"decision rendered. Appellants appeared in an-
"swer to the petition."

The fact that the petitioner is an officer of the court does not entitle him to any privilege not accorded to other suitors.

Receiver of State Bank v. *First National Bank, 34 N. J. Eq., 451.*

The appellees in the court below claimed that this proceeding could be maintained as an ancillary and dependent proceeding supplementary to the original suit and relied on the cases of *Porter* vs. *Sabin, 149 U. S., 473; Rouse* vs. *Letcher, 156 U. S., 47; Gregory* vs. *Van Ee, 160 U. S., 643,* and *White* vs. *Ewing, 159 U. S., 57.*

Porter vs. *Sabin* was an action of stockholders for an accounting and for the payment of the amount found due against the officers of the corporation, of which the state court had appointed a receiver who had taken possession of its assets. The action was brought after the state court had denied the receiver's petition for authority to bring it and the plaintiff's application for leave to make him a party.

On page 480 the court says: "The whole prop-
"erty of the corporation *within the jurisdiction*
"*of the court* which appointed the receiver, in-
"cluding all its rights of action, except so far as
"already lawfully disposed of under orders of that
"court, remains in its custody, to be adminis-
"tered and distributed by it".

In *Rouse* vs. *Letcher* the point involved was whether a decree in an intervening petition though separable from the main suit, followed the finality of the decree of the Circuit Court of Appeals in the main suit in which the jurisdiction depended entirely upon diverse citizenship. The intervention was for the recovery of damages due to the negligence of the receiver. The opinion delivered by Mr. Chief Justice FULLER reads in part as follows:

"It is plain, however, that the intervention was "entertained as belonging to that class of proceed- "ings recognized as allowable when property "sought to be charged is in *custodia legis*, and *not* "*on any other ground.* Although appellee's claim "was purely a legal one, she did not bring an ac- "tion at law, but was permitted to intervene by "petition as in the assertion of a claim upon the "property or fund being administered by the "court. It is well settled that *where property is* "*in the actual possession of a court*, this draws to "it the right to decide upon conflicting claims to "its ultimate possession and control; and that "*where assets are in the course of administration*, "all persons entitled to participate may come in, "under the jurisdiction acquired between the orig- "inal parties, by ancillary or supplementary pro- "ceedings."

The same principle is laid down in *Gregory* vs. *Van Ee*. In the case of *White* vs. *Ewing*, the question certified to this court for determination was: "Had the Circuit Court of the United States "in a general creditor's suit properly pending "therein for collection, administration and distri- "bution of the assets of an insolvent corporation, "the jurisdiction to hear and determine an ancillary "suit instituted in the same cause by its receiver "in accordance with its order, against debtors of "such corporation, so far as in said suit, the re- "ceiver claimed the right to recover from any one "debtor a sum not exceeding $2,000."

This court, having answered the question in the affirmative, says at page 39:

"The circuit court obtained jurisdiction over the "Cardiff Coal & Iron Company by the filing of the "original creditor's bill of Bosworth, a citizen of "Massachusetts, and by the appointment of a re- "ceiver, and any suit by or against such receiver, "in the course of the winding up of such corpora- "tion, *whether for the collection of its assets or* "*for the defense of its property rights*, must be "regarded as ancillary to the main suit, and as "cognizable in the circuit court, regardless either "of the citizenship of the parties or of the amount "in controversy."

And at page 40 :

" In this case, however, the court proceeds upon " its own authority *to collect the assets* of an es- " tate, with the administration of which it is " charged ; and, if the receiver in such cases ap- " pears as a party to the suit, it is only because " he represents the court in its inherent power to " wind up an estate of an insolvent corporation " over which it has by an original bill obtained " jurisdiction."

We do not deny that under certain conditions the receiver for the collection of the insolvent's assets could have brought an action against Kneeland for his breach of the agreement of June 1st, 1891, in accordance with and under the provisions of the agreement of June 3rd, 1891, nor do we deny that Bache during the pendency of the action by appropriate proceedings could have invoked the jurisdiction of the Circuit Court, but the above cases do not support the claim that the receiver by this petition can obtain from citizens of a foreign state the delivery of property without the appointing court's jurisdiction and of which a foreign court had taken charge.

Porter vs. *Sabin*, and the other cases deal with rights of actions of the insolvent *in personam*, while this proceeding is essentially one *in rem*. Furthermore, though it be for argument's sake, admitted that the mortgaged property and not the bonds is in this case the *res* which draws to the court having possession thereof all controversies in relation thereto, the cases cited do not support the contention of the appellees, for the reason :

(1.) The Circuit Court had no longer poseession of the mortgaged property, the same having been sold and the sale made absolute.

(2.) The foreclosure case being no longer *in fieri*, but on the contrary, final judgment having been entered, this proceeding is not ancillary to such suit.

(3.) This proceeding is not brought in the administration of the insolvent estate or for the collection of its assets either for its own or its creditors' benefit.

The receiver does not invoke the aid of the court for the benefit of the bondholders or any other creditors of the railroad company, but for the benefit of the purchaser. *The receiver does not seek to reduce the assets of the railroad company to his possession for distribution among the creditors or to collect the same in the administration of the insolvent estate*, but attempts after the entry of the final decree and after the claims of all creditors have been adjusted to get some benefit for persons who are not parties to the litigation and for whom he has no right to act and for whose benefit he has no right to come into court. *No claim is made that Bache is a debtor of the insolvent, nor that Bache asserts a claim tending to diminish the fund of the insolvent held for the benefit of creditors. No claim is made that the bonds be delivered to the receiver for the purpose of reducing the indebtedness of the insolvent corporation.* On the contrary, the petition itself shows that these very bonds have been decreed to be a portion of the indebtedness of the railroad company. It is an evident attempt of the purchasers through the medium of the receiver to reach for property to which they have no right whatever, either legally or morally. The substitution in the place of the receiver of the assignee of the purchasers' bid conclusively demonstrates this.

To make use of the language employed in *Gableman* vs. *Peoria, Decatur & Evansville Rwy. Co., 101 Fed. Rep., 1, 5;* affirmed in *179 U. S., 335*, though the facts therein differ from the case at bar: "The case now under con-
" sideration is not, properly speaking, ancillary
" to the case brought in the Circuit Court, in
" which the receiver was appointed. It does not
" aid or supplement the purposes of that suit.

"* * * It is not intended directly to increase, "or diminish, or in any way affect the assets in- "trusted to him, whatever may be its incidental "effect."

If the decree entered on this petition be carried out it would complete the unconscionable attempt on the part of the purchaser to cancel the bonds in question, not for the purpose of increasing the distributive share of the bondholders, but in relieving himself from paying a portion of the purchase price, to wit, the distributive share due on these bonds.

Sixth.

Assuming, although not conceding, that this proceeding is, as against the appellant Bache in the nature of one *in personam*, still the jurisdiction of the Circuit Court cannot be sustained, for it is well settled that its process cannot run or be served outside of the territorial limits of its jurisdiction.

It nowhere appears in the record or in the return to the writ of certiorari that, as stated in the opinion of the court below (Record, page 95), "Bache, as a junior encumbrancer of the railroad "and property of the Toledo, St. Louis and Kansas "City Railroad Company, was made one of the "original defendants in this suit, and entered his "appearance herein, on the 24th day of January, "1894, and afterwards set up his claim, by answer, "in the foreclosure suit, and also proved it before "the master, in the creditors' suit, which is the "same claim, upon which his proceeding, in the "State court is founded."

But even if this were so, the fact that Bache was made a party to the foreclosure proceedings for the purpose of barring or cutting off his equity of redemption in the mortgaged premises as a junior en-

cumbrancer, does not affect the question for the reason that as to him the foreclosure case had reached a final termination and that the subject matter of the receiver's petition has no relevancy to, or connection with, the subject matter of the controversy between the mortgagees and Bache in the foreclosure case.

It appears, however, from the final decree of foreclosure that Bache filed an amended intervening petition which was dismissed on the merits for want of equity as against the complainant (Return to Writ, page 15), but when this intervening petition was finally disposed of by the decree of dismissal the jurisdictional functions of the Circuit Court in relation to Bache ceased, save only as the interest of Bache as a judgment lien creditor of the mortgaged property was involved. Inasmuch, however, as it appears affirmatively from the record that the proceeds of sale under foreclosure were not sufficient to pay the first mortgage bonds and interest thereon, such interest became nugatory and extinct. But, however this may be, such interest of Bache has absolutely no relation whatever to the subject matter of the securities held by the Farmers' Loan & Trust Company which he seeks to reach as a creditor of Kneeland by virtue of his two judgments recovered in the New York Supreme Court.

The courts have always scrupulously safeguarded the rights of a party to be summoned into court only by personal service except in extraordinary cases.

Pennoyer v. *Neff*, *95 U. S., 714.*

It requires no argument to show that substituted service without voluntary appearance is unavailing to confer jurisdiction.

In *Smith* vs. *Woolfolk*, *supra*, and *Bowen* vs. *Christian*, *supra*, the order for substituted service in cases similar to this was set aside.

In any possible view of the case the Circuit Court

had no jurisdiction of the person of this appellant nor jurisdiction or power over the subject matter, to wit: the bonds in question, or to withdraw the same from the jurisdiction of the Supreme Court of the State of New York, or in any wise to neutralize, impair or affect injuriously to this appellant the force and effect of any judgment or decree which he may obtain in his suit pending in that court.

Seventh.

It is respectfully submitted that the decree appealed from be reversed, and that the cause be remanded to the court below with instructions to sustain the plea of this appellant and dismiss the petition.

F. SPIEGELBERG,
Counsel for Appellant.